FIL

In the
Supreme Court of the United States
OCTOBER TERM, 1960

No. 93

THE DAHLBERG COMPANY, A CORPORATION
Respondent

vs.

WESTERN HEARING AID CENTER, LTD., A CORPORATION
Petitioner

THE DAHLBERG COMPANY, A CORPORATION
Respondent

vs.

WESTERN COMPANY, INCORPORATED, AN ORE-
GON CORPORATION
Petitioner

THE DAHLBERG COMPANY, A CORPORATION
Respondent

vs.

WESTERN HEARING CENTER, INC., A CORPORATION
Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF THE STATE OF MINNESOTA

JOSEPH ROBBINS
827 Plymouth Building
Minneapolis 3, Minnesota
Attorney for Petitioners

INDEX

	PAGE
Opinion below	2
Jurisdiction	2
Question presented	2
Constitutional provisions involved	2
Statement of case	3
I. Procedural history of case	3
II. Facts material to the question presented	3
III. Federal question raised below in trial court and before Minnesota Supreme Court	6
Argument	7
I. Certiorari should be granted in the instant case because an important question affecting jurisdiction of state courts over non-resident corporations and the right of non-resident corporations under the Fourteenth Amendment is involved. The "single act" theory particularly when applied to a purchase instead of a sale, giving rise to jurisdiction over non-resident corporations, needs to be clearly defined	7
II. Purchase and attendant activity as insufficient minimal contact	11
Conclusion	19

AUTHORITIES CITED

Statutes:

Minnesota Statutes Annotated:	
Section 303.13, Subd. 1 (3)	2, 3, 5, 6, 8, 9, 10
28 U. S. C. A., Section 1257 (3)	2

Constitutions:

Constitution of the State of Minnesota, Art. 6, Sec. 2 . . . 2

Cases:

A. G. Bliss Co. v. United Carr Fastener Co. of Canada (1953), 116 F. Supp. 291 16
Beck v. Spindler, — Minn. —, 99 N. W. 2d 670 . . . . . 10, 16, 19, 20
Emerson Radio and Phonograph Corporation v. Mayflower Sales Company, 124 N. Y. S. 2d 83 (1953) 13, 21
Greenberg v. Lamson Bros. Company, 75 N. Y. S. 2d 233 (1947) 14, 20
International Shoe Company v. State of Washington, 326 U. S. 310 . . . . . 9, 12, 13, 16, 17, 18, 20, 21
McGee v. International Life Insurance Company, 355 U. S. 220, 78 S. Ct. Rep. 199 . . . . . 16, 18
Mueller v. Steel Case, Inc. (1959), D. Minn., 172 F. Supp. 416 11
Rosenberg Bros. & Company, Inc. v. Curtis Brown Company, 260 U. S. 516 . . . . . 12, 14, 21
Shilling v. Roux Distributing Co., Inc., 240 Minn. 71 . . . . . 10, 17

Texts:

12 A. L. R. 2, 1439, Section (3) 12
39 Va. L. Rev. 966 18
42 Minn. L. Rev. 909, 921 19

In the
Supreme Court of the United States
OCTOBER TERM, 1960

No. ——

THE DAHLBERG COMPANY, A CORPORATION
Respondent

vs.

WESTERN HEARING AID CENTER, LTD., A CORPORATION
Petitioner

THE DAHLBERG COMPANY, A CORPORATION
Respondent

vs.

DAHLBERG WESTERN COMPANY, INCORPORATED, AN OREGON CORPORATION
Petitioner

THE DAHLBERG COMPANY, A CORPORATION
Respondent

vs.

OREGON HEARING CENTER, INC., A CORPORATION
Petitioner

PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF THE STATE OF MINNESOTA

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Minnesota entered in the above entitled case January 27, 1961.

OPINION BELOW

The opinion of the Minnesota Supreme Court is reported at — Minn. —, 107 N. W. 2d 381.

JURISDICTION

The judgment of the Minnesota Supreme Court was pronounced January 27, 1961. The jurisdiction of this Court is invoked under *28 U. S. C. A.*, Section 1257 (3).

Article 6, Section 2 of the Constitution of the State of Minnesota provides: "The Supreme Court shall consist of one chief judge and not less than six or more than eight associate judges, as the legislature may establish. It shall have original jurisdiction in such remedial cases as may be prescribed by law, and appellate jurisdiction in all cases, but there shall be no trial by jury in said court." Adopted November 6, 1956.

From the final judgment of the Minnesota Supreme Court after taking such appeal from the District Court of Hennepin County, Minnesota, petitioner has no further remedy under the laws of the State of Minnesota.

QUESTION PRESENTED

Is the constitutional guarantee of due process infringed by the decision of the Minnesota Supreme Court in applying *Minnesota Statutes Annotated* 303.13, Subd. 1 (3) in granting jurisdiction over a non-resident corporation based on minimal contact, consisting solely of purchases from respondent, in the State of Minnesota?

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF CASE

I.

Procedural history of case.

Petitioners were served with process in accordance with *Minnesota Statutes Annotated* 303.13, Subd. 1 (3), by service on the Secretary of State of Minnesota on June 22, 1959.

On October 21, 1959 petitioners served notice of motion and motion to dismiss in the nature of a motion to quash service of process for lack of jurisdiction. The motion of petitioners was denied by order of the District Court dated November 30, 1959.

Petitioners filed notice of appeal to the Minnesota Supreme Court on December 28, 1959. After receiving briefs and hearing oral arguments by counsel, the Minnesota Supreme Court rendered judgment on January 27, 1961, affirming the order of the District Court. Petitioners have no further remedy by appellate review in the State of Minnesota.

II.

Facts material to the question presented.

This case involves the right of a Minnesota corporation to obtain jurisdiction in Minnesota Courts over Oregon corporations under the Fourteenth Amendment to the United States Constitution.

The respondent, the Dahlberg Company, a Minnesota corporation, is engaged in the manufacture and sale of hearing aids, parts and accessories. Respondent is seeking to recover on five promissory notes which two of the petitioners had made and delivered to respondent at its plant in Golden Valley, Minnesota, and upon an open account

had with one petitioner. Each of the notes is payable in Minnesota. Each petitioner is a corporation organized and existing under the laws of Oregon. The case against Western Hearing Center, Ltd. is to recover a note for $6,886.88 delivered to respondent in Golden Valley, Minnesota, on November 7, 1958, payable there in 12 monthly installments of $673.89 on which there is a balance due of $5,738.90. The case against Dahlberg Western Company, Inc., is to recover $3,042.69 as the balance owing on account for hearing aids and accessories purchased by petitioners from respondent in Minnesota. The case against Oregon Hearing Aid Center, Inc. is to recover on a promissory note for $5,678.00 made and delivered to respondent at its plant in Golden Valley, Minnesota, and payable there on demand. The second case against Oregon Hearing Center, Inc. is to recover on a promissory note for $2,947.20 made and delivered to respondent at its plant in Golden Valley, Minnesota, payable there on demand. The case against Oregon Hearing Aid Center, Inc., is to recover on a promissory note for $4,724.00 made and delivered to respondent on July 1, 1958, at its plant in Golden Valley, Minnesota, payable there on demand. The balance remaining unpaid on this note is $2,084.40. The second case against Oregon Hearing Aid Center, Inc. is to recover on a promissory note for $6,724.00 made and delivered by petitioner to respondent on November 20, 1958, at respondent's plant in Golden Valley, Minnesota, payable there on demand. The balance owing on this note is $5,229.60. The total amount involved in all six cases is $24,720.79, all of which is payable by petitioners to respondent in Golden Valley, Minnesota.

Because the same problem is involved in each case, the appeal to the Minnesota Supreme Court was perfected

as to each petitioner and not to each individual action in order to avoid needless repetition, and for the same reason this petition is brought on the same basis.

The summons and complaint in each action was served by leaving a duplicate copy with the Secretary of State of Minnesota as agent for process pursuant to *Minnesota Statutes Annotated* 303.13, Subd. 1 (3).

One Harold S. Jones is an officer and director of the three petitioners and has acted in behalf of all of them.

The petitioners are corporations organized and existing under the laws of the State of Oregon. Each is engaged in the sale and distribution of hearing aids and accessory products in areas outside the State of Minnesota. Petitioner, Dahlberg Western Company, Inc., entered into two contracts in writing with respondent, a distributors agreement and a district distributors basic quota agreement, which contracts were made and executed in the State of Minnesota. Respondent filled the orders of the petitioners at their plant in Golden Valley, Minnesota. Orders were delivered to petitioners f.o.b. the office and plant in Golden Valley, Minnesota. The president of each of the petitioners, namely, Harold S. Jones, did attend sales meetings and conferences at the office of the plaintiff in Golden Valley where business policies, plans and procedures were discussed, considered and decided upon. The promissory notes in question were executed by petitioners at respondent's office in Golden Valley. The notes were delivered to respondent in Golden Valley, Minnesota, and made payable there.

The petitioners have never qualified to do business in Minnesota. Petitioners do not have agents within the State of Minnesota to transact or solicit business. They have no salesmen, either resident or traveling, within the State of

Minnesota, have no warehouse or other storage facilities in Minnesota, and do no advertising in Minnesota. They have no assets or property there, nor do they have a bank account in Minnesota. They do not have any booth or display room in Minnesota, do not make deliveries in Minnesota, do not hold any directors' meetings in Minnesota, have not made any installation of equipment in Minnesota, do not have their names in any building directories, telephone directories or on any office doors or any vehicles in Minnesota, and have no office or other place of business in Minnesota. Petitioners make no sales in Minnesota. Their only activities have been purchases from respondent.

The trial court found that petitioners had sufficient contacts in the State of Minnesota to bring them within the jurisdiction of *Minnesota Statutes Annotated* 303.13, Subd. 1 (3). The Supreme Court of Minnesota arrived at the same conclusion by affirming the order of the District Court denying petitioners' motion to quash service of process.

III.

Federal question raised below in trial court and before Minnesota Supreme Court.

The basis for petitioner's motion in the trial court was the constitutional guarantee of the right of due process and was expressed in the memorandum presented to the trial court in support of petitioner's motion. The federal question was brought to the trial court's attention in the following manner: "Several other states have expanded their jurisdiction over foreign corporations by enacting similar statutes and it is submitted that any state may, by legislation, extend its jurisdiction over foreign corporations to any point it deems appropriate, *PROVIDED* that such

statutes, as applied to any particular case, do not run contrary to the due process clause of the United States Constitution. The United States Supreme Court has, from time to time, determined the requisites for due process relative to jurisdiction over the defendant foreign corporation."

Petitioners also brought the constitutional question before the Supreme Court of the State of Minnesota in defining the legal issues to be heard before that court by the following question: "Would the application of M. S. A. 303.13, Subd. 1 (3) be valid under the United States Constitution if applied to the case at bar."

Both the trial court and the Minnesota Supreme Court found that the application of the Minnesota statute to the facts of this case was not in violation of the United States Constitution which provides for the guarantee of due process of law in the Fourteenth Amendment.

ARGUMENT

I.

Certiorari should be granted in the instant case because an important question affecting jurisdiction of state courts over non-resident corporations and the right of non-resident corporations under the Fourteenth Amendment is involved. The "single act" theory particularly when applied to a purchase instead of a sale, giving rise to jurisdiction over non-resident corporations, needs to be clearly defined.

Plaintiff brings six actions, five on promissory notes and one on an open account. The defendants are three foreign corporations which had substantially similar contacts within the State of Minnesota. Consequently, for the sake of brevity, this argument will pertain to all de-

fendants except where it hereinafter specifically alludes to either one or the other.

Essentially the basic question to be resolved is whether petitioners have had sufficient contacts within Minnesota so as to be amenable to the jurisdiction of the State. The defendants were served under the provisions of *M. S. A.* 303.13, Subd. 1 (3) which reads in part as follows:

> "(3) If a foreign corporation makes a contract with a resident of Minnesota to be performed in whole or in part by either party in Minnesota, or if such foreign corporation commits a tort in whole or in part in Minnesota against a resident of Minnesota, such acts shall be deemed to be doing business in Minnesota by the foreign corporation and shall be deemed equivalent to the appointment by the foreign corporation of the Secretary of the State of Minnesota and his successors to be its true and lawful attorney upon whom may be served all lawful process in any actions or proceedings against the foreign corporation arising from or growing out of such contract or tort. Such process shall be served in duplicate upon the secretary of state, together with a fee of $6 and the secretary of state shall mail one copy thereof to the corporation at its last known address, and the corporation shall have 20 days within which to answer from the date of such mailing, notwithstanding any other provisions of the law. The making of the contract or the committing of the tort shall be deemed to be the agreement of the foreign corporation that any process against it which is so served upon the secretary of state shall be of the same legal force and effect as if served personally within the State of Minnesota. As amended Laws 1955, c. 820, §30; Laws 1957, c. 538, §1."

If the acts done or contacts made by petitioners within Minnesota fall within the sweeping purview of the statute,

the question remaining concerns the constitutional validity, under the Due Process clause of the Federal Constitution, of *M. S. A.* 303.13, Subd. 1 (3) as it pertains to the particular set of facts in question. It is submitted that the petitioners did not have sufficient contacts with the State of Minnesota to render them amenable to suit there. No attempt is made to strike down the statute in toto. If petitioners prevail, they will do so by virtue of the fact that the statute in question is repugnant to the Federal Constitution if applied in this case.

At the outset, it is agreed that any state may, by legislation, extend its jurisdiction over foreign corporations to any point it deems appropriate, PROVIDED that such statute, as applied to any particular case, does not run contrary to the due process clause of the United States Constitution.

This Court, in *International Shoe Company v. State of Washington*, 326 U. S. 310, decided in 1945, set out the requirements necessary for a foreign corporation to be amenable to suit in the forum state. The criteria established by this decision are the basis for determining due process requirements relative to service of a foreign corporation and all decisions regarding this question now fall under the shadow of the Court's holding in that case. The broad and general principle to which courts were directed was stated as follows:

> "* * * But now that the capias ad respondendum has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"

The Court, *supra*, became somewhat more explicit when it stated that the demands of due process

> "* * * may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this case. Hutchinson v. Chase and Gilbert, 45 F. 2d 139, 144."
> *Supra*, 317.

Further, the Court recognized that

> "* * * Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. *Supra*, 319.
>
> "That clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties or relations. Pennoyer v. Neff, supra; Minnesota Commercial Association v. Benn, 261 U. S. 140."

It is apparent that an inflexible and arbitrary guide as to what is or is not violative of the Constitution relative to service of process of foreign corporations cannot definitely be established. Each case must be the result of an assessment and evaluation of all relevant circumstances.

M. S. A. 303.13, Subd. 1 (3) does not give Minnesota the almost unlimited jurisdiction it purports to have. This has been judicially determined by both the Minnesota Supreme Court[1] and the United States District Court. In

[1] *Schilling v. Roux Distributing Co., Inc.*, 240 Minn. 71; *Beck v. Spindler*, — Minn —, 99 N. W. 2d 670.

Mueller v. Steel Case, Inc. (1959), D. Minn. 172 F. Supp. 416, involving an action based on tort, the Court, Judge Gunnar H. Nordbye, had the following to say:

> "It may be, as plaintiff urges, that Minnesota has attempted by this statute to thrust aside all prior concepts of that which constitutes the doing of business by a foreign corporation in the State and has endeavored to wipe out all jurisdictional barriers where any part of the commission of a tort in this state damaging a citizen may be attributed to a foreign corporation. But such an attempt baldly offends the Federal Constitution. * * * Obviously, an attempt to lodge a suit in this state under such circumstances and to require the seller to come here to defend, offends the very basic elements of fair play and substantial justice. * * *"

The Court then alluded to the United States Supreme Court's directions:

> "In the final analysis, service of process against foreign corporations under state statutes must be tested by Federal Law, and the landmark case in that regard is the International Shoe Company Case."

II.

Purchase and attendant activity as insufficient minimal contact.

The contacts the petitioners had with the respondent in the cases were essentially that petitioners purchased hearing aids, parts and accessories from the respondent and negotiated distributing agreements and contracts, including notes, attendant this goal. Petitioners' president did attend sales meetings and conferences at the office of the respondent in this regard.

There seems to be no point in discussing every phase of

the wide range of decisions subsequent to the *International Shoe Company* case. This argument will be confined to the case law relating to purchasing activities by a foreign corporation as giving or not giving the forum state proper jurisdiction.

At the outset, it should be noted that purchasing activities, in and of themselves, were not traditionally considered sufficient to give a forum state jurisdiction over a foreign corporation. Any change from this position must then necessarily be an extension of the existing judicial determinations.

It has been frequently held that the purchase of goods within the state by a foreign corporation, even at regular intervals, will not, in and of itself justify the conclusion that the corporation is present within the jurisdiction of the state so as to be subject to process. See *12 A. L. R. 2, 1439*, Section (3). Perhaps the landmark case in this area is this Court's decision in *Rosenberg Bros. & Company, Inc. v. Curtis Brown Company*, 260 U. S. 516. Admittedly, the case was decided long before the *International Shoe* case. However, it is important and pertinent as background and, as will be shown later, the holding in *Rosenberg* has been reconciled with the directions of *International Shoe Company*.

Plaintiff, Rosenberg Company, was a New York corporation. It brought suit against the Curtis Brown Company, an Oklahoma corporation. Service of process was made by delivery of summons on defendant's president while he was in New York temporarily. Defendant appeared specially to quash service on the ground that defendant was not found within the state. The sole issue to be resolved was whether defendant was doing business within the State of New York in such a manner as to warrant an inference that it was present there.

Defendant was a small retail dealer in men's clothing and furnishings in Oklahoma. It never had applied for a license to do business in New York nor did it, at any time, authorize suit to be brought there. It had no property, stockholder, agent or offices in New York. Defendant did, however, purchase from time to time a large part of its merchandise in New York. These purchases were sometimes made through correspondence and at other times by visits of defendant's officers in New York.

The Court granted defendant's motion to quash service, stating:

> "The only business alleged to have been transacted by the company in New York, either then or theretofore, related to such purchases of goods by officers of a foreign corporation. Visits on such business, even if occurring at regular intervals, would not warrant the inferences that the corporation was present within the jurisdiction of the state."
>
> *Supra* at 518.

The doctrine of Rosenberg, holding that purchasing activities are not sufficient to confer jurisdiction, was reconciled with the requirements of the *International Shoe* case in *Emerson Radio and Phonograph Corporation v. Mayflower Sales Company*, 124 N. Y. S. 2d 83 (1953). Defendant was a Missouri corporation engaged in the wholesale distribution of electrical appliances and equipment. It sold its products in Missouri and Kansas only. The only business activity defendant had with the forum state, New York, was the purchase of goods for resale exclusively within other states. There was no showing that defendant made sales in New York or that anyone was employed there.

The plaintiff relied to a great extent on the *International*

Shoe Company case. The defendant cited the *Rosenberg* decision. The Court distinguished the two cases.

> "There (International Shoe Company) the foreign corporation regularly solicited business within the state through a sizable staff of salesmen which it maintained, and who lived in Washington. Consequently, held the Court, it was proper for the State of Washington to impose an assessment for unemployment compensation upon the foreign corporation. Moreover the ruling in Rosenberg, supra, was not overruled by the decision in the International Shoe case."
>
> *Supra* at 84.

The motion to quash service was granted.

In *Greenberg v. Lamson Bros. Company*, 75 N. Y. S. 2d 233 (1947), the defendant, an Ohio corporation, operated a department store. It was not qualified to do business in New York nor did it maintain an agent in New York. It did not have a place of business there nor did it maintain an office in New York. Defendant had no telephone listing, owned no real estate, paid no taxes, held no directors' meeting, and had no bank accounts or books in New York. The Court added "what is especially significant is that it makes no sales whatsoever in this state and has no salesmen or other representative to solicit orders * * *." *Supra* at 234.

Defendant bought several million dollars worth of goods a year and sent in large staffs of buyers to New York from time to time. It also employed in New York a resident company devoted to collecting information relating to wholesale marketing conditions. This resident company also represented some forty-five other department stores and was, in all practicality, a resident buyer for these stores.

Defendant had numerous activities and contacts in New York which, plaintiff urged, constituted doing business there. Defendant officers came to New York to participate in meetings with buyers to determine buying policies. Defendant buyers and officers, incidental to the buying of merchandise and interviewing of salesmen, had occasional stenographic service and the use of the resident buyer's telephone. Occasional claims in connection with merchandise purchased were adjusted in New York. The resident buyer listed defendant's name, along with the other department stores it represented, on its directory board. The defendant had a mailbox in the building. Further, there were also some purchases shipped to defendant via the resident buyer who reassembled the purchases and forwarded them to defendant to save freight costs. Defendant also had a contract with an employment agency in New York to refer prospective employees to the defendant in New York City. Applicants were interviewed in New York for work in Ohio. The Court disposed of plaintiff's contentions by holding that the incidents, listed above, were nothing more than normal incidents of buying. Defendant's motion to quash service was granted.

> "In the final analysis, it would indeed be far-fetched to hold that a department store retailing merchandise exclusively within the State of Ohio was 'doing business' within the State of New York, when it sold not a single dollar's worth of merchandise in this state, when it solicited no orders in this state for the sale of its merchandise, when practically all that it did here was to buy its merchandise and in connection with such purchases utilized the facilities of a 'resident buyer.'"
>
> *Supra* at 236.

This case was decided in 1947, two years after the *International Shoe Company* case.

One of the most recent cases concerned with the problem of purchasing by a foreign corporation as establishing sufficient contacts so as to be amenable to suit in a forum state is *A. G. Bliss Co. v. United Catr Fastener Co. of Canada* (1953), 116 F. Supp. 291. The defendant, a Canada corporation, and a wholly owned subsidiary of a Massachusetts corporation, moved to quash service. The Court held that the fact that defendant was a wholly owned subsidiary was not enough to confer jurisdiction, neither were the facts that defendant's officers were Massachusetts residents and that defendant made a single isolated sale in the State of Massachusetts. As to purchases, the Court held :"Purchases made in Massachusetts do not in themselves make defendant subject to service in Massachusetts. Rosenberg Bros. and Company, Inc. v. Curtis Brown Co., 260 U. S. 516."

The Court concluded that the sum total of the above activities were insufficient to confer jurisdiction.

This decision also was determined subsequent to the *International Shoe* case.

The trial court, in denying petitioners' motion to dismiss, cited *McGee v. International Life Insurance Company*, 355 U. S. 220, 78 S. Ct. Rep. 199; *International Shoe Co. v. Washington*, 326 U. S. 310; and *Beck v. Spindler*, — Minn. —, 99 N.W. 2d 670.

These cases can be distinguished on the facts.

In the *International Shoe* case defendant, during the years in question, employed from 11 to 13 salesmen who resided in Washington. Their principal activities were confined to that State and they received commissions as compensation for goods sold in Washington. They solicited

orders from prospective buyers at terms and prices fixed by defendant.

The State of Washington, the U. S. Supreme Court concurring, held that SOLICITATION in the forum state coupled with additional activities were sufficient to confer jurisdiction over defendant. The additional activities were as follows:

1. Defendant's salesmen displayed samples of products, sometimes in a permanent display room.

2. Salesmen resided within the State of Washington for a period of years.

3. A substantial volume of merchandise was regularly shipped by appellant to purchasers within the state.

The case at bar may be distinguished, inasmuch as here we have no solicitation whatsoever, no salesmen residing in Minnesota, no permanent display rooms and no volume of merchandise being regularly shipped to purchasers in Minnesota.

The Minnesota Supreme Court, in *Schilling v. Roux Distributing Co., Inc.*, 249 Minn. 71, counters the argument in that case that the facts were distinguishable from those in the *International Shoe Co.* case, and by so doing indicates that it was concerned with the solicitation and sale of goods as doing business.

> "Systematic solicitation of orders is carried on for only one purpose, namely, the sale of goods. Similarly, the type of activities involved here has the same goal. The sale of goods and the continuous and systematic shipment of such goods into this state is; and ought to be recognized as, the doing of business in this state. Similarly, activities such as we have here is, and ought to be recognized as, the doing of business. We believe that the proper application of the

rule laid down in the International Shoe Co. case will lead to that result, even though the solicitation of orders in this case constituted a minor role in the activities of the defendant's employees. It is obvious that they were here for only one purpose; namely, to encourage the use of defendant's products and stimulate the sale thereof. Their activities resulted in the shipment of a substantial volume of goods into this state. That should be sufficient to constitute the doing of business * * * ."

Supra at 86.

The courts have always been concerned with the sale of products within the forum state. Purchasing, however, from a forum state presents a completely different matter. At any rate, the *International Shoe Co.* case is distinguishable from the case at bar on the facts involved.

In *McGee v. International Life Insurance Company, supra,* the defendant had issued reinsurance to a California resident who was the policy holder. The application for reinsurance was sent from Texas to California. The insured filled it out and mailed it back to the Texas Company. The certificate of reinsurance was then mailed from Texas to the policy holder in California. In addition, the California policy holder had regularly mailed payments to the defendant in Texas. Plaintiff brought action in California and thereafter sued on the California judgment in Texas. The Texas Court denied liability and on appeal, this Court held that the defendant had established sufficient contact in California to render it amenable to suit. This case is not only distinguishable from the facts, but can further be distinguished by the type of activity involved. It involves an activity which can be classified as exceptional. In such cases, the state has a particular interest in the protection of its citizens (see *39 Va. L. Rev.* 966;

42 *Minn. L. Rev.* 909, 921). This Court alluded to this interest when it said "it cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims * * *" (355 U. S. 223, at 226).

Beck v. Spindler, supra, decided by the Minnesota Supreme Court in November, 1959, can also be distinguished. The defendant, a manufacturer located in Indiana sold house trailers to Minnesota residents through a dealer located at Duluth, Minnesota. In addition, the defendant entered into an express warranty with the purchaser, reimbursed the dealer for advertisements of its products, sent in its own employees to Minnesota to remedy defects in the house trailer sold, and joined with the dealer in filing documents required by law to enable the dealer to obtain a license. Clearly, the contacts in *Beck v. Spindler* were of a different kind and nature from the case at bar.

Although it is submitted that the contacts of each of the petitioners with the State of Minnesota relative to each action brought by plaintiff are insufficient to render the petitioners amenable to suit here, it may be well to point out, at this juncture, that the action brought upon an open account against defendant, Dahlberg Western Company, differs from the other actions, inasmuch as no note was executed by defendant payable to plaintiff. Clearly the contacts of petitioner, as they pertain to that action, are insufficient to confer jurisdiction in Minnesota.

CONCLUSION

As previously stated, this argument is generally confined to the question of whether or not purchasing activities by a foreign corporation in a forum state are considered sufficient contacts to render the foreign corporation amenable to suit in the forum state.

The "minimum contact" requirement of the *International Shoe Co.* case is easily stated but difficult to apply to any given set of facts. The petitioners are not quarreling with the theory that a "single" act within the forum state may be sufficient to confer jurisdiction or that systematic and continuous activities need not be shown. They agree that "whether the minimal contacts required exist in a particular case should depend on the quality and nature of the transaction rather than on the quantity of business done by the foreign corporation * * *." *Beck v. Spindler*, *supra* at 677.

The activities in the instant case are purchasing Minnesota products. The contacts with this State are attendant to and pertinent to this goal. Consequently, it is strongly urged that serious consideration be given analogous case law relative to purchasing activities. However, the language of the courts belie that theory. Consider the language of the New York Court in *Greenburg v. Lamson Bros. Company*, *supra* at 236:

> "In the final analysis, it would indeed be far-fetched to hold that a department store retailing merchandise exclusively within the State of Ohio was 'doing business' within the State of New York, when it sold not a single dollar's worth of merchandise in this state, when it solicited no orders in this state for the sale of its merchandise, when practically all that it did here was to buy its merchandise and in connection with such purchases utilized the facilities of a 'resident buyer.'"

And at 234,

> "what is especially significant is that it makes no sales whatsoever in this state and has no salesmen or other representatives to solicit orders * * *."

A consideration of a few of the cases that have been concerned with the question of purchasing activities as being sufficient to grant the forum state jurisdiction clearly indicates that such activities generally are not sufficient. Cases decided subsequent to the *International Shoe Company* have considered the directions in the *International Shoe* case. They have also been swayed by Justice Brandeis' opinion in the *Rosenberg* decision. At least one court (*Emerson Radio and Phonograph Corporation v. Mayflower Sales Company, supra*) specifically points out the fact that the *International Shoe* case did not overrule the *Rosenberg* case. Consequently, in view of existing judicial interpretations relating to purchasing activities and being mindful of the directions in *International Shoe* case, it is submitted that petitioners' activities in Minnesota in the instant case are clearly insufficient to confer jurisdiction to Minnesota. To require petitioners to defend here, to allow service of process on petitioners to stand, would be offensive to the "traditional concept of fair play and substantial justice," and a violation of petitioners' guarantee of Due Process under the Fourteenth Amendment to the Federal Constitution.

Respectfully submitted,

JOSEPH ROBBIE
827 Plymouth Building
Minneapolis 3, Minnesota
Attorney for Petitioners

In the
Supreme Court of the United States

No. 941

THE DAHLBERG COMPANY, a corporation,

Respondent,

vs.

LORS HEARING AID CENTER, LTD., a corporation,

Petitioner.

THE DAHLBERG COMPANY, a corporation,

Respondent,

vs.

WESTERN COMPANY, INCORPORATED, an Oregon

Petitioner.

THE DAHLBERG COMPANY, a corporation,

Respondent,

vs.

BEVERLY HEARING CENTER, INC., a corporation,

Petitioner.

OPPOSING BRIEF OF RESPONDENT

JOHN M. PAISLEY
210 Roanoke Building
Minneapolis 2, Minnesota
Attorney for Respondent

FAUSKE and ROGERS

Law Print Brief 156 — Main 10 Minn.

INDEX

	PAGE
Opinion below	1
Jurisdiction—Objection Thereto by Respondent	2
Statement of case	8
I. Procedural history of case	8
II. Facts material to the question presented	9
Argument	11
Certiorari should be denied because the decision of the Supreme Court of Minnesota in the instant cause is in accord with applicable decisions of this Court	11
Appendix A—Judgment of the Minnesota Supreme Court	19

AUTHORITIES CITED

Statutes:

Minnesota Statutes Annotated:
- Section 303.13, subd. 1 (3) 3
- Section 605.09 (3) 3

28 U. S. C. A., Section 1257 (3) 2

Court Rules:

Rules of Civil Procedure for the District Courts of Minnesota, vol. 27A Minnesota Statutes Annotated, Rules 12.01, 12.02, 12.04 ..... 3, 4, 6, 7, 8

Rules of Civil Procedure for the District Courts of the United States, Rules 12 (b) and 12(d) 3

Rules of the Supreme Court of the United States, Rules 33 (3) (b), 23 (1) (j), 19 parag. 1, subparag. (a) 1, 2, 12

Cases:

Bruce v. Tobin (1917), 245 U. S. 18 5
Butts v. Geisler (1954), 242 Minn. 154, 64 N. W. 2d 147 4
Cahaley v. Cahaley (1943), 216 Minn. 175, 12 N. W. 2d 182 7
Clark v. Kansas City (1898), 172 U. S. 334 5
Compania De Astral v. Boston Metals Co. (1954), 205 Md. 237, 107 Atl. 2d 357, 108 Atl. 2d 372, 49 A. L. R. 2d 646; cert. den. 348 U. S. 943 15
Curran v. Nash (1947), 224 Minn. 571, 29 N. W. 2d 436, 174 A. L. R. 411 4
Duluth Logging Co. v. Pulpwood Co. (1917), 137 Minn. 312, 163 N. W. 520 13
Estate of Henry Hartz (1953), 238 Minn. 558, 58 N. W. 2d 57 8
First State Bank of Odessa v. First State Bank (1927), 172 Minn. 223, 214 N. W. 781 8
Gospel Army v. Los Angeles (1946), 331 U. S. 543 ..8, 9
Guy v. Dictating Machine & Record Co. (1940), 208 Minn. 534, 294 N. W. 877 6
Hanson v. Denckla (1958), 357 U. S. 235 12
Harkness v. Hyde (1878), 98 U. S. 476 6
Henry R. Jahn & Son, Inc. v. Superior Court (1958), 49 Cal. 2d 855, 323 P 2d 437 14
Holcombe v. McKusik (1858), 61 U. S. 552 5
International Shoe Co. v. Washington (1945), 326 U. S. 310 ..... 12, 13, 17
Jung v. K & D Mining Co. (1958), 356 U. S. 326 .. 6
Massey v. Consumer Hay Co. (1931), 184 Minn. 196, 238 N. W. 327 13
McGee v. International Life Insurance Co. (1957), 355 U. S. 220 12
Meagher v. Minnesota Thresher Mfg. Co. (1892), 145 U. S. 608 5
Merchants State Bank v. Sunset Orchard Land Co. (1924), 158 Minn. 108, 196 N. W. 963 17

Missouri & Kansas R. Co. v. Olathe (1911), 222 U. S. 185 5
Moorehart v. Furley (1921), 149 Minn. 56, 182 N. W. 723 6
Nees v. Minneapolis Street Ry. Co. (1946), 221 Minn. 396, 22 N. W. 2d 164 8
Piano Mfg. Co. v. Kanfert (1902), 86 Minn. 13, 89 N. W. 1124 4
Philadelphia & R. Coal & I. Co. v. Gilbert (1917), 245 U. S. 162 ..... 5, 6
Pope v. Atlantic Coast Line R. Co. (1952), 345 U. S. 379 ..... 6, 7
Radio Station WOW v. Johnson (1940), 326 U. S. 120 8
Republic Natural Gas Co. v. Oklahoma (1947), 334 U. S. 62 8
Rosenberg Bros. & Company v. Curtis Brown Co. (1923), 260 U. S. 516 ..... 12, 13, 14
Sellars v. Sellars (1936), 196 Minn. 143, 264 N. W. 425 6
State ex rel. Peter Adent v. Industrial Commission (1951), 234 Minn. 567, 48 N. W. 2d 42 6
Sterling Novelty Corp. v. Frank Hirsch D. Co. (1948), 299 N. Y. 208, 86 N. E. 2d 564, 12 A. L. R. 2d 1435 12
Werner v. Charleston (1844), 151 U. S. 360 5

Texts and Legal Articles:

37 Minn. L. Rev. 309, 324-325 4
41 Yale L. Journal 539, 552 4
62 A. L. R. 2d 937, 941-948 6
12 A. L. R. 2d 1439 13
89 L. Ed. 1192 6
97 L. Ed. 214 6

In the
Supreme Court of the United States

No. 931

THE DAHLBERG COMPANY, a corporation
Respondent

vs.

WESTERN HEARING AID CENTER, LTD., a corporation
Petitioner

THE DAHLBERG COMPANY, a corporation
Respondent

vs.

DAHLBERG WESTERN COMPANY, INCORPORATED, an Oregon corporation
Petitioner

THE DAHLBERG COMPANY, a corporation
Respondent

vs.

OREGON HEARING CENTER, INC., a corporation
Petitioner

OPPOSING BRIEF OF RESPONDENT

Respondent submits the following in opposition to the petition for writ of certiorari.

OPINION BELOW

Petitioners correctly cite the unofficial report of the opinion of the Minnesota Supreme Court in 107 N. W. 2d 381. However, the notice served by petitioners on counsel for respondent pursuant to Rule 33 (3) (b) of

this Court makes no mention indicating that the judgment of the Minnesota Supreme Court has been included in the transcript or a certified copy appended to the petition as required by Rule 23 (1) (j). Accordingly, we append a certified copy of the judgment of the Minnesota Supreme Court to this brief as Appendix A. Petitioners were defendants and respondent was plaintiff below.

Jurisdiction—Objection Thereto By Respondent

Petitioners invoke the jurisdiction of this Court under Section 1257 (3) of *28 U. S. C. A.* which clearly provides for review in this Court by certiorari of final judgments or decrees rendered by the highest court of the state in which a decision could be had. Respondent objects to jurisdiction of this Court on the ground that no final judgment has been rendered by the Supreme Court of Minnesota.

The judgment of the Minnesota Supreme Court simply affirmed an order of the trial court denying petitioners' motions to quash service of process and to dismiss six separate actions which were consolidated for hearing in the trial court. This is apparent from the opening sentence of the opinion of the Minnesota Supreme Court. It is also apparent from the order of the trial court found in the printed transcript of the record below at pages 23-24,[1] and the judgment of the Minnesota Supreme Court attached as Appendix A.

Petitioners' motions to quash service of the process were interposed immediately following the service of the summonses and complaints on the secretary of state by re-

[1] Parenthetically, it is pointed out that the numerical references within parenthesis hereinafter set out are to the pages and folio of the printed transcript where the matter cited will be found.

spondent pursuant to Section 303.13, Subd. 1 (3), *Minnesota Statutes Annotated, Supplement,* and before petitioners interposed any other defenses by answer to the merits (R. pp. 2, 4, 6, 9, 12, 14). This was done pursuant to Rule 12.02 of the *Rules of Civil Procedure* for the district courts of Minnesota which permits the defendant at his option to raise lack of jurisdiction over the person by motion prior to any further responsive pleading by way of answer. The district court is required by Rule 12.04 to hear such plea prior to trial upon application of any party unless the court orders that the hearing and determination thereof be deferred until the trial.[2]

Rule 12.01 of said *Minnesota Rules of Civil Procedure* also provides that if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading must be served within 10 days after service of a notice of the court's action. Petitioners who were defendants below, chose to interpose the defense of lack of jurisdiction by motion brought on for hearing prior to trial and before interposing any other defenses by answer. The motions were consolidated and heard on affidavits in support (R. pp. 10, 12, 15) and in opposition to the motion (R. pp. 16-23). Upon denial of their motions to quash, petitioners chose to appeal from the order denying their motions. In Minnesota, an order denying a motion to quash service of process for lack of jurisdiction over the person is appealable under Section 605.09 (3), *Minnesota Statutes Annotated,* which provides for appeal by the aggrieved party, "From an order involving

[2] Rules 12.02 and 12.04 correspond to Rules 12 (b) and 12 (d) of the Federal Rules of Civil Procedure. Minnesota adopted rules of civil procedure substantially the same as the Federal rules on January 1, 1952. See Rule 86.01 of said Minnesota Rules, vol. 27A, *Court Rules Minnesota Statutes Annotated.*

the merits of the action or some part thereof."[3] An order denying a motion to quash service of process is regarded as an order "involving the merits," because it would require a defendant to undertake the trouble and expense of a trial in a court which may lack jurisdiction. *Curran v. Nash* (1947), 224 Minn. 571, 29 N. W. 2d 436, 174 A. L. R. 411; *Butts v. Geisler* (1954), 242 Minn. 154, 64 N. W. 2d 147; *Piano Mfg. Co. v. Kaufert* (1902), 86 Minn. 13, 89 N. W. 1124; *37 Minnesota Law Review* 309, 324-325. It is apparent from the foregoing that an order over-ruling a motion to quash service of process for alleged lack of jurisdiction over the person is interlocutory. It is simply a preliminary step in the proceedings. An order over-ruling such motion does not complete the litigation but simply removes an obstacle to proceeding with the main event consisting in a trial on the merits. In the case at bar, the Supreme Court of Minnesota simply entered judgment affirming with costs the order of the trial court over-ruling petitioners' consolidated motions to quash the service. See Appendix A attached hereto. On February 7, 1961, the consolidated cases were remitted to the trial court where defendants were thereafter free to answer to the merits under Rule 12.01 of the *Minnesota Rules of Civil Procedure* within 10 days after notice of the court's decision.

It was held many years ago by this Court that it would not entertain a writ of error to the Supreme Court of Minnesota for review of an interlocutory order made at the pleading stage of litigation for the reason that there

[3] Such statutory provision appears to be found in the laws of many states. It is generally regarded as an exception to the general rule providing for appellate review from the final judgment only. *Carleton M. Crick*, "The Final Judgment as a Basis for Appeal", *41 Yale L. Journal* 539, 552, footnote no. 64.

was no final judgment. *Holcombe v. McKusik* (1858), 61 U. S. 552. In that case, defendant demurred to a portion of plaintiff's reply to his answer. The trial court sustained the demurrer, and plaintiff appealed from the order of the trial court sustaining the demurrer by striking out portions of his reply. The Supreme Court of the territory of Minnesota entertained the appeal from the order under an early territorial statute permitting appeal "from the district to the Supreme Court on an interlocutory order affecting the merits.", and it affirmed the trial court. However, this Court refused to issue the writ of error, pointing out that the judgment of the Supreme Court of Minnesota affirming the order below did not dispose of the whole matter in controversy; that portions of the reply left standing by the order below raised issues of law and fact calling for determination by a trial on the merits; and that it was settled law that the writ of error would lie only from a final judgment which determined the whole of the matters in controversy.[4] Likewise, this Court will not review a judgment of the court of last resort of a state which simply affirms an order of the trial court over-ruling a demurrer to a complaint or sustaining a demurrer with leave to plead over. The reason is that the judgment is not final, because the aggrieved party may answer or otherwise plead over. *Meagher v. Minnesota Thresher Manufacturing Co.* (1892), 145 U. S. 608; *Werner v. Charleston* (1894), 151 U. S. 360; *Clark v. Kansas City* (1898), 172 U. S. 334; *Missouri & Kansas R. Co. v. Olathe* (1911),

[4] Although the writ of error was abolished as a vehicle of appellate review to this Court by the Act of September 6, 1916, ch. 448, 39 Stat. at L. 726, 28 U.S.C. Section 344, and writ of certiorari substituted, nevertheless, the finality of judgments rule was in no way affected. Certiorari will not issue to the court of last resort of a state unless there is a final judgment. See *Bruce v. Tobin* (1917), 245 U. S. 18; *Philadelphia & R. Coal & I. Co. v. Gilbert* (1917), 245 U. S. 162, infra.

222 U. S. 185; see *Jung v. K & D Mining Co.* (1958), 356 U. S. 335, 337; and see notes in 89 L. Ed. 1192 and 97 L. Ed. 214. The only exception appears to be in the case where it clearly appears that the party aggrieved has no other defense to interpose and that the order over-ruling the demurrer puts a complete end to the case. *Pope v. Atlantic Coast Line R. Co.* (1952), 345 U. S. 379.

In our research, we could find no case where this Court reviewed a judgment of a court of last resort of a state which simply affirmed an order of a trial court over-ruling a motion to quash service. The only cases which we could find show that this Court has been called upon to consider state jurisdiction over the person only upon the final judgment rendered after a trial on the merits which followed the denial of the motion to quash service of process: *Harkness v. Hyde* (1878), 98 U. S. 476; *Philadelphia & R. Coal & I. Co. v. Gilbert* (1917), 245 U. S. 162. The party aggrieved by the over-ruling of a motion objecting to jurisdiction suffers no prejudice in Minnesota by thereafter going to trial on the merits, because he does not waive his jurisdictional objection by going to trial after his plea to jurisdiction is over-ruled. *Sellars v. Sellars* (1936), 196 Minn. 143, 264 N. W. 425; *Guy v. Dictating Machine & Record Co.* (1941), 208 Minn. 534, 537, 294 N. W. 877; see *Moorehart v. Furley* (1921), 149 Minn. 56, 57, 182 N. W. 723; *State ex rel. Peter Adent v. Industrial Commission* (1951), 234 Minn. 567, 48 N. W. 2d 42; see also Rule 12.01 of the *Minnesota Rules of Civil Procedure*. In this respect, Minnesota is in line with the majority rule prevailing in other states and in the federal courts. See note in *62 A. L. R.* 2d 937, 941-948.

In the instant case, the judgment of affirmance entered

by the Supreme Court of Minnesota on February 7, 1961, left standing the order of the trial court made on November 30, 1959 over-ruling petitioners' motions to quash service for lack of jurisdiction over their persons. Under Rule 12.01 of the *Minnesota Rules of Civil Procedure*, petitioners had 10 days from the service of notice of the court's order to answer. Although counsel for respondent did serve a notice of the order of the trial court denying the motions to quash on counsel for petitioners by mail on December 2, 1959, and the clerk of the Minnesota Supreme Court served the notice, required by Rule XIV of that Court (27A *Minnesota Statutes Annotated*, p. 31), nevertheless, professional courtesy in Minnesota 'would forbid counsel for respondent to enter judgment of default' against petitioners, unless petitioners' counsel made it clear to counsel for respondent that petitioners intended to interpose no defenses other than lack of jurisdiction over the person. See *Cahaley v. Cahaley* (1943), 216 Minn. 175, 179-180, 12 N. W. 2d 182. Petitioners have never made it known to respondent or its counsel whether they do intend to interpose other defenses in addition to lack of jurisdiction, and the record is devoid of any indication of the intent of petitioners in this regard. If they do make it clear to respondent that they intend to interpose no defenses other than lack of jurisdiction, then, under the doctrine of *Pope v. Atlantic Coast Line R. Co.*, 345 U. S. 379, *supra*, the judgment of the Minnesota Supreme Court may be regarded as final. Absent a clear statement to that effect on the part of petitioners, the judgment of the Supreme Court of Minnesota lacks finality. We see no reason of great public concern which would otherwise prompt any departure from the long-standing rule and policy of this Court which strongly favors review of state court action from final judgments only.

See *Republic Natural Gas Co. v. Oklahoma* (1947), 334 U. S. 62, 67-69; *Gospel Army v. Los Angeles* (1946), 331 U. S. 543, 548; cf. *Radio Station WOW v. Johnson* (1940), 326 U. S. 120, 123-124.

STATEMENT OF CASE

I.

Procedural history of case.

Petitioners correctly state the procedural history in the main part, but they are not entirely correct in stating that they have no further remedy by appellate review in Minnesota. As we have pointed out, *supra* in our objection to jurisdiction, petitioners have the right to interpose other defenses by answer under Rule 12.01 of the *Minnesota Rules of Civil Procedure*, and to be heard at a trial on the merits. After final judgment is entered by the trial court following the trial on the merits, petitioners may again appeal from the final judgment to the Supreme Court of Minnesota. If it should appear from the record made on the trial of the merits that the facts differ from those set out in the affidavits upon which the motion to quash was heard, the Supreme Court of Minnesota will again consider the jurisdictional point originally raised on the motion to quash. True, the order over-ruling the motion to quash affirmed by the Supreme Court of Minnesota has become the law of the case in respect to those facts set out in the affidavits for and against the motion, but this in no way precludes petitioners from endeavoring to show different facts if they can, upon the trial. See *First State Bank of Odessa v. First State Bank* (1927), 172 Minn. 223, 225, 214 N. W. 781. *Nees v. Minneapolis Street Ry. Co* (1946), 221 Minn. 396, 22 N. W. 2d 164; *In re Estate of Henry*

Hartz (1953), 238 Minn. 558, 559, 58 N. W. 2d 57. See also the comments of this Court in *Gospel Army v. Los Angeles*, 311 U. S. 543, 547-548 *supra*.

II.

Facts material to the question presented.

Petitioners' statement of the material facts is substantially correct, but it does not adequately cover those facts of record which show the nature, character and extent of the petitioners' contacts with respondent in Minnesota.

Petitioners are inter-related Oregon corporations possessing common officers, directors and stockholders who, in turn, are related by blood or other family ties to Harold S. Jones who is an officer, director and general manager of all of the petitioning corporations (R. p. 19, f. 3 to p. 20, f. 2). The dominant petitioner is Dahlberg Western Company, Inc., which had a written distributor contract with respondent which was made and executed in Minnesota on October 1, 1958 (R. p. 20, f. 3; Exhibit A, attached to the transcript of the record at p. 39). The contract was renewable automatically for one year periods unless notice of termination was given by either party sixty days prior to any anniversary date (R. p. 39; Exhibit A, parag. 10). Petitioner agreed to maintain adequate sales, service, and storage facilities and agreed to use its best efforts to sell and promote the respondent's products and agreed to submit orders in writing to respondent for acceptance or refusal at its place of business in Minnesota (R. p. 39; Exhibit A, parags. 3, 4). Petitioner agreed that it would operate in accordance with respondent's published policies and procedures; that it would report each sale of Dahlberg products immediately following a sale; and that it would buy Dahlberg products for resale in its

trade territory comprising Washington, Oregon and a part of British Columbia (Exhibit A, parags. 1, 9; also R. p. 20). A second agreement was also entered into by said petitioner with respondent on October 1, 1958, called "Basic Quota Agreement" (R. p. 20, f. 3; p. 39; Exhibit B). According to this second agreement, petitioner agreed to buy at least $3,800 worth of hearing aids at distributor's prices each month (Exhibit B, parag. 5). It also agreed to cooperate in formulating respondent's policies, procedures, sales and promotion programs; it agreed to participate with respondent in advertising, to maintain a good credit rating, and to submit financial information when requested by respondent (Exhibit B, parag. 2). Petitioner also agreed orally to supervise, direct and manage the sales and distribution of Dahlberg hearing aid products to other dealers and distributors in its territory, in consideration of which respondent promised to pay said petitioner a commission of seven per cent on all hearing aid products purchased from respondent in Minneapolis by hearing aid dealers and distributors for resale in the aforementioned trade territory (R. p. 21, ff. 1-2). The hearing aid products were deliverable f.o.b. respondent's plant in Minneapolis, Minnesota (R. p. 39; Exhibit A, parag. 5). In the performance of these agreements, there resulted frequent and continuous business contacts between respondent and all of the petitioners in Minnesota such as: (a) the filling of orders received from petitioners at respondent's plant in Golden Valley,[5] Minneapolis, Minnesota; (b) the delivery of the hearing aid products to petitioners in Minnesota f.o.b. respondent's plant in Golden Valley, Minneapolis, Minnesota; (c) the frequent attend-

[5] Golden Valley is a suburban village contiguous to the city of Minneapolis, and its post-office address is Minneapolis.

ance of Harold S. Jones, the officer and general manager of petitioners, at the office of respondent's plant in Golden Valley, Minneapolis, Minnesota; (d) the making and executing of agreements between the parties at respondent's office in Minnesota relating to the financing of the purchase of hearing aid products by petitioners and other dealers within the trade territory (R. pp. 21-22). As a consequence of the aforementioned contacts between respondent and petitioners, these activities and events took place in Minnesota: regular receipt of reports relating to hearing aid products sold by petitioners, receipt of payment for products sold, receipt of customer lists, receipt of monthly financial statements, and the receipt of hearing aids for repairs and parts (R. p. 22, f. 3). The promissory notes forming the subject matter of five of the instant cases grew out of the aforementioned business contacts of petitioners with respondent in Minnesota. The promissory notes were executed and delivered by petitioners to respondent in Minnesota and are payable in Minnesota (R. pp. 22-23). The open account purchase of hearing aids, which forms the subject matter of the sixth of the instant cases, also grew of said business contacts and the hearing aids were delivered to petitioner, Dahlberg Western Company, Inc., f.o.b. respondent's plant in Minnesota (R. p. 18, f. 1).

ARGUMENT

Certiorari should be denied because the decision of the Supreme Court of Minnesota in the instant cause is in accord with applicable decisions of this Court.

As a rule of general guidance for those who would seek review of a judgment of a state court on certiorari from this Court, it is said that it should appear that the

state court has decided a federal question in a way probably not in accord with applicable decisions of this Court. Rule 19, parag. 1, subparag. (a). The decision of the Supreme Court of Minnesota is not contrary to the applicable decisions of this Court, but rather is in accord with those decisions.

The decision below is in accord with the "minimal contact" test of state jurisdiction over non-residents laid down in *International Shoe Co. v. Washington* (1945), 326 U. S. 310, 316. It is also in accord with *McGee v. International Life Insurance Co.* (1957), 355 U. S. 220; cf. *Hanson v. Denckla* (1958), 357 U. S. 235.

The only decision of this Court to which petitioners can point where there may be a semblance of discord is *Rosenberg Bros. & Company v. Curtis Brown Co.*, 260 U. S. 516, which was decided in 1923 or some twenty-three years prior to *International Shoe*. The *Rosenberg* case was decided on the basis of the so-called "presence theory" of state jurisdiction over non-resident corporations. The "presence theory" has long since been superseded by the more flexible concept of "minimal contacts" expressed for the first time in the year 1945 in *International Shoe*.

Petitioners argue that the purchasing activities by a foreign corporation in the forum state are to be distinguished from sales activities in the forum state; that purchasing activities of a non-resident corporation no matter how well established or continuous or extensive, cannot be regarded as contacts of a character justifying the assumption of jurisdiction over the non-resident by the forum state to enforce contacts made by the non-resident with citizens in the forum state; and that a state service of process statute which would permit the assumption of jurisdiction over a non-resident corporation to enforce contracts

tract growing out of such purchasing activities would deny due process to such non-resident. They would construe *Rosenberg* as expressive of such a sweeping and absolute state of the law of jurisdiction *in personam* both before and after *International Shoe*.

However, such was not the state of the law either before or after *International Shoe*. Before *International Shoe* it was held that purchasing activities of a foreign corporation in the State of New York justified assumption of jurisdiction by New York where such activity was continuous, extensive, and conducted from a fixed locale. *Sterling Novelty Corp. v. Frank & Hirsch D. Co.* (1948), 299 N. Y. 208, 86 N. E. 2d 564, 12 A. L. R. 2d 1435. In the last cited case, it is significant that the New York court distinguished *Rosenberg* as presenting a situation where the foreign corporation came only intermittently or sporadically to New York on buying missions and without any fixed locale. The annotation following *Sterling Novelty Corp.* in 12 A. L. R. 2d 1439 points to many additional situations where purchasing activities of a foreign corporation within the forum state had justified the assumption of jurisdiction prior to *International Shoe*. In Minnesota, it was held before both *Rosenberg* and *International Shoe* that purchasing activities of a foreign corporation in Minnesota justified the assumption of jurisdiction over the person of such corporation to enforce contracts which had grown out of such purchasing activity and which had been made and were to be performed in Minnesota. *Duluth Logging Co. v. Pulpwood Co.* (1917), 137 Minn. 312, 163 N. W. 520; *Massey v. Corsumer Hay Co.* (1931), 184 Minn. 196, 238 N. W. 327.

A case arising in California subsequent to *International Shoe* expresses what would seem to be the proper per-

spective toward the *Rosenberg* decision. *Henry R. Jahn & Son, Inc. v. Superior Court* (1958), 49 Cal. 2d 855, 323 P. 2d 437. In that case, the American Drying Systems, Inc., a California corporation, brought suit against Henry R. Jahn & Son, Inc., a New York corporation, and two individual defendants, claiming that the defendant corporation, hereinafter called Jahn for brevity, had conspired with the individual defendants to cause a breach of exclusive distribution contracts with certain of its South American distributors. The defendant corporation, Jahn, was the exclusive export agent for plaintiff's grain driers in New York. It placed orders with plaintiff by mail or telegram from New York. The driers were delivered to Jahn f.o.b. California or sent to a forwarding company in California. On only one occasion did Jahn send an agent to California, and this was an auditor who delivered a check to plaintiff for a large purchase of driers. Process was served on the Secretary of State of California pursuant to a statute authorizing service on that official where a return is made to the court reciting that the foreign corporation cannot be found in the jurisdiction. The defendant corporation, Jahn, applied for a writ from the Supreme Court to direct the superior court to quash service, a procedure followed in California which calls for initial decision by the trial court and which is then reviewed by the Supreme Court. The superior court set aside the service, but the Supreme Court reversed. The same argument was made by defendant Jahn as the petitioners are now urging, namely, that Jahn was a New York corporation without property, agents, or office in California and had engaged in no business there except purchasing plaintiff's products for resale in the South American market. Jahn supported its argument by relying on the *Rosenberg* case.

In rejecting Jahn's argument, the Supreme Court of California said (323 P. 2d at p. 440):

> "Jahn's purchase of goods in this state is a regular part of its business. It nevertheless contends that it is not amenable to suit here, invoking Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U. S. 516, 43 S. Ct. 170, 67 L. Ed. 372. The United States Supreme Court, however, has advanced beyond the presence theory of jurisdiction underlying that case. McGee v. International Life Insurance Co., 355 U. S. 220, 78 S. Ct. 199, 200, 2 L. Ed. 2d 223; see also International Shoe Co. v. Washington, 326 U. S. 310, 315, 317, 66 S. Ct. 154. Under the minimum contacts test of the International Shoe case regular sales solicitation alone can constitute doing business rendering the foreign corporation amenable to process in actions engendered by such activities. (Citing numerous cases which are omitted for sake of brevity.) Since there is no distinction for jurisdictional purposes between regular selling and regular buying (Sterling Novelty Corp. v. Frank & Hirsch D. Co., 299 N. Y. 208, 210, 86 N. E. 2d 564, 12 A. L. R. 2d 1435; Star v. Elkhorn Coal Co. v. Red Ash Pocahontas Coal Co., D. C., 102 F. Supp. 258, 259), the Rosenberg case is as obsolete for the one as for the other." (Matter in first parenthesis added.)

Another case in point is *Compania De Astral v. Boston Metals Co.* (1954), 205 Md. 237, 107 A. 2d 357, 108 A. 2d 372, 49 A. L. R. 2d 646; certiorari denied 348 U. S. 943. In that case, suit was brought by a Maryland corporation against a Panama corporation to recover damages for breach of a single contract, consisting of two parts, to purchase three vessels of the frigate class which were located in plaintiff's shipyard in Baltimore, Maryland. The activities and negotiations looking toward the

purchase had been conducted partly in Baltimore and partly in New York. Suit was brought by the Maryland plaintiff against the Panama corporate defendant in the Baltimore City Court pursuant to a Maryland statute, which provided that a foreign corporation was subject to suit in Maryland by a resident of that state on any cause of action arising out of a contract made in the state whether or not such foreign corporation was doing business in the state. Defendant moved to quash service claiming, among other things, that the statute, if construed to sustain jurisdiction over it, was unconstitutional as a denial of due process. Defendant was engaged in the business of exporting bananas from South American countries to New Orleans. Its only office and place of business was in Panama. It maintained no office, no place of business, and no representative in Maryland. Its only contacts with Maryland consisted in sending a representative to Baltimore to negotiate the terms of the purchase agreement which it signed in Panama and sent back to plaintiff in Maryland for plaintiff's execution; to send a representative to Maryland to inspect the vessels; to send $80,000 to a Maryland bank to hold as an escrow fund against performance of the agreement; and to carry on communications by mail and by telephone with plaintiff in Baltimore relating to maritime clearance of the registry of the vessels and other details concerned with the purchase agreement. The trial court denied the motion to quash service, and it was upheld by the Court of Appeals of Maryland. The Court found that the contract to purchase the vessels was made in Maryland because the last act giving effect to the contract took place there; hence, there was no doubt that the statute governing jurisdiction applied. More significantly, the court held that the statute

was not a denial of due process and relied principally upon the *International Shoe* case in reaching that result. The court pointed out that the defendant's contacts with Maryland were such as to make it reasonable to subject the defendant to suit in Maryland. The court also stressed the point that not only had the contract of purchase been made in Maryland, but it was to be performed there by delivery of the vessels to defendant's representatives at plaintiff's ship yards in Baltimore. These same circumstances are present in the cases at bar. The promissory notes which form the subject matter of five of the cases were made by petitioners and are payable by petitioners to respondent in Minnesota (R. pp. 22-23).[6] Likewise, the open account purchase forming the subject matter of the sixth action was performed in Minnesota by delivery of the hearing aid products f.o.b. respondent's plant in Minneapolis (R. p. 18, f. 1).

The Maryland Court made no mention of any distinction to be drawn between purchasing activities and sales activities for the purpose of determining the right of a Maryland citizen to subject a non-resident corporation to suit in that state. It considered and discussed only whether the nature of the contacts of the foreign corporation in Maryland were such as to make it reasonable and just to subject the corporation to suit there. This should be the relevant consideration since it was said in *International Shoe*, 326 U. S. 310, 316:

> "* * * But now that the *copias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that

[6] A promissory note executed and to be performed by payment in Minnesota is a Minnesota contract governed by the laws of Minnesota. *Merchants State Bank v. Sunset Orchard Land Co.* (1924), 158 Minn. 108, 110, 196 N. W. 963.

> in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "

Any distinction between purchasing activities and sales activities for purpose of now determining whether due process has been satisfied in the assumption of jurisdiction by any forum state, is purely artificial and should be paid no heed.

The court below very properly, we believe, found it reasonable and just to subject petitioners to the jurisdiction of the courts of Minnesota. Petitioners voluntarily sought and entered upon contracts and extensive business activities with respondent in Minnesota. They took delivery of goods from respondent in Minnesota and contracted to pay for them in Minnesota by delivering their promissory notes to respondent payable in Minnesota. Petitioners have shown no hardship in being compelled to respond to their obligations in the Minnesota courts. Due process has not been denied them.

Respectfully submitted,

JOHN M. PALMER
210 Roanoke Building
Minneapolis 2, Minnesota
Attorney for Respondent

Of Counsel:
LEVITT, PALMER AND ROGERS

APPENDIX A

STATE OF MINNESOTA, SUPREME COURT.

38030-1-2

The Dahlberg Company,

Respondent,

vs.

Western Hearing Aid Center, Ltd., Dahlberg Western Company, Inc., and Oregon Hearing Center, Inc.,

Appellants.

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the order of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Hennepin be and the same hereby is in all things affirmed.

And it is further determined and adjudged that respondent herein, do have and recover of appellants herein the sum and amount of One Hundred Ninety-Three and 70/100 Dollars ($193.70) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed February 7, 1961.

By the Court:
MAE SHERMAN,
Clerk.

Statement for Judgment

Statutory costs: $25.00.
Printer: $168.45.
Acknowledgements: $0.25.
Total: $193.70.

April 17, 1961.

Satisfaction of judgment filed.

Therefore the above judgment is duly satisfied in full and discharged of record.

MAE SHERMAN,
Clerk.

Supreme Court

ss.

State of Minnesota

I, Mae Sherman, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the City of St. Paul, May 29, 1961.

MAE SHERMAN,
Clerk.
JOHN McCARTHY,
Deputy